Supreme Court, U.S.
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No. 08-140

IN THE
Supreme Court of the United States

TAMARA THOMPSON and
DISABLED RIGHTS ACTION COMMITTEE,

Petitioners,

v.

MICHAEL E. TURK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

I. RESPONDENT DOES NOT DISPUTE THAT THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH NATIONALLY APPLICABLE ADMINISTRATIVE GUIDANCE.

As was noted in the Petition for a Writ of Certiorari ("Petition"), the decision of the Ninth Circuit is directly contrary to HUD's *nationally applicable* guidance (as regards the second question – which concerns the application of the "continuing violations doctrine"). Pet. at 18-21. The inconsistency with HUD's guidance was noted by the Ninth Circuit. *See, Garcia v. Brockway*, 526 F.3d 456, 462 (9th Cir. 2008). Accordingly, the Ninth Circuit's decision causes the Fair Housing Act ("FHA") to be enforced differently in eight states (California, Nevada, Montana, Idaho, Oregon, Washington, Arizona, Alaska, and Hawaii) than in the 42 other states.

The Brief in Opposition ("Opposition") is silent regarding the effect of the Ninth Circuit's decision on the consistent nationwide enforcement of the FHA. Furthermore, the Opposition fails to address Petitioners' analysis showing that HUD's guidance is consistent with the plain language of the FHA. *See* Pet. at 19-21.

II. RESPONDENT MISUNDERSTANDS THE "IMPORTANT MATTER" AT ISSUE IN THE FIRST QUESTION PRESENTED.

This Court's rule setting forth the standards for granting writs of certiorari addresses conflicts that involve "important matters," not merely conflicts regarding any particular statutory "provision." Sup. Ct. R. 10(a). The "important matter" presented in the first question presented is whether § 3604(f)(3)(C)[1] is an independently actionable "discriminatory housing practice" or whether § 3604(f)(3)(C) merely defines a form of "discrimination" for the purposes of §§ 3604(f)(1) and 3604(f)(2).

Notably, the Opposition makes *no argument* for a structural[2] distinction between § 3604(f)(3)(B) and § 3604(f)(3)(C). Such omission is no mere oversight as *no argument can be made* to distinguish § 3604(f)(3)(B) from § 3604(f)(3)(C) in terms of the *structure* of the FHA. Instead, the Opposition disputes Petitioners' assertion that the decision of the Ninth Circuit is in conflict with *City of Edmonds v. Oxford House*, 514

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[1] All section references are to Title 42 of the United States Code unless otherwise stated.

[2] Sections 3604(f)(3)(B) and 3604(f)(3)(C), of course, describe different forms of discrimination. Accordingly, the facts in cases where the discrimination at issue is as defined at § 3604(f)(3)(B) necessarily differ from the facts of cases where the discrimination at issue is as defined at § 3604(f)(3)(C).

U.S. 725 (1995) and with decisions of various circuit courts of appeals.

Respondent seeks to characterize this Court's decision in *City of Edmonds v. Oxford House*, 514 U.S. 725 (1995) as affording the possibility that § 3604(f)(3)(B) is "an independently-actionable discriminatory housing practice." (Oppo. at 7). In support of such conclusion, Respondent notes that this Court has referred to "prohibitions against discrimination set out in §§ 3604(f)(1)(A) and (f)(3)(B)." *City of Edmonds*, 514 U.S. at 732 n.4 and at 738. Respondent fails to note that the quoted language clearly considers the two sections as coordinated provisions -- one provision (§ 3604(f)(1)(A)) sets forth one form of an *unlawful* "discriminatory housing practice" and the other provision (§ 3604(f)(3)(B)) sets forth a relevant definition of "discrimination." In other words, the language used in *City of Edmonds* is completely consistent with the language of the statute -- and is contrary to the decision of the Ninth Circuit.

Rather than showing that the decision of the Ninth Circuit is consistent with other circuits viz-a-viz the relationship of § 3604(f)(3) to the *discriminatory housing practices* set forth at § 3604(f)(1) and § 3604(f)(2), Respondent merely shows that various circuit courts of appeals have used various terms to describe a definition of "discrimination" that serves an integral role in establishing a "discriminatory housing practice." Such terms include "an affirmative duty," and a "requirement," that can be "violated." The use of such terminology, however, does not show that a court

has treated § 3604(f)(3)(B) as *an independently actionable* "discriminatory housing practice" because "discrimination" – in and of itself – does not provide a *cause of action.* The scope of redress available for discrimination (of any sort) is limited by the terms of the relevant statute and by the Constitution.[3]

Congress can, of course, draft a statute so that "discrimination" is more than a definition, but an independent cause of action. For example, "Title VII of the Civil Rights Act of 1964 makes it an 'unlawful employment practice' to discriminate 'against any individual with respect to his compensation . . . because of such individual's . . . sex.'" *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, ___, 127 S.Ct 2162, 2166 (2007) (quoting 42 U.S.C. § 2000e-2(a)(1)). The plain language of the FHA, however, is

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[3] For example, in the context of the ADA, this Court has noted that:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908).

Bd. Of Trustees of the Univ. Of Alabama v. Garrett, 531 U.S. 356, 374 n. 9 (2001).

fundamentally different from Title VII because "discrimination" is not the same as a "discriminatory housing practice."

In addition to cataloging the varied terminology used by the circuit courts of appeals to describe § 3604(f)(3)(B), Respondent takes pains to minimize the practical effect of the conflict between the decision of the Ninth Circuit and *Fair Housing Council, Inc. v. Village of Olde St. Andrews, Inc.*, 210 Fed. Appx. 469, 481 (6th Cir. 2006), cert. denied 128 S.Ct. 880 (2008). Oppo. at 10-11. Despite Respondent's contention, the conflict is readily apparent to federal courts. *See, e.g., Kuchmas v. Towson Univ.*, 553 F.Supp. 2d 556 (D. Md. 2008).

Finally, Respondent seeks to limit the significance of *Village of Olde St. Andrews* based upon the fact that such case concerned the "sale" of dwellings, instead of the "rental" of dwellings. Oppo. at 10-11. Section 3604(f)(3)(C), however, makes no reference to either "sales" or "rental." Respondent's suggested limitation of *Village of Olde St. Andrews* is inherently at odds with the decision of the Ninth Circuit which held that § 3604(f)(3)(C) is *an independently actionable* "discriminatory housing practice." Thus, Respondent has *emphasized* the conflict between the Ninth Circuit and the Sixth Circuit.

III. RESPONDENT'S ARGUMENT REGARDING THE LACK OF "URGENCY" FOR GRANTING CERTIORARI DEMONSTRATES A FUNDAMENTAL MISUNDERSTANDING OF THE REALITIES OF ENFORCING THE FAIR HOUSING ACT.

Respondent does not dispute that private suits are the most important enforcement mechanism of the FHA. Instead, Respondent makes the remarkable assertion that the Ninth Circuit's imposition of a two year statute of repose on private suits constitutes a significant boon to the private enforcement of the FHA.

It appears that the second part of the Opposition (Oppo. at 12-14) is presented as a "public policy" argument in support of the Ninth Circuit's disregard of the plain language of the FHA. *See* Pet. at 12-14. Ironically, though, Respondent has presented a case showing that the Ninth Circuit's public policy argument is without merit.

Petitioners asserted that "a plain reading of § 3614(a) . . . shows that the Attorney General's authority to bring suit is not limited to situations where there is an 'alleged discriminatory housing practice' (as is required of private litigants under § 3613(a)(1)(A))." Pet. at 13. *United States v. Edward Rose & Sons*, 246 F.Supp.2d 744 (E.D. Mich. 2003) does not mention any "discriminatory housing practice" and the enforcement provision quoted in that opinion was § 3614(a). *Id.* at 749.

In support of its divergence from the plain

language of the FHA, the Ninth Circuit mistakenly believed that its decision would enhance the Attorney General's ability to enforce the FHA. Similarly, Respondent's own attempt to justify veering from the plain language of the FHA seeks support from supposed "benefits" to private enforcement. Such argument ignores three significant realities.

First, judicial amendment[4] of the FHA is not required for private enforcement to address discriminatory design and construction *prior to* housing being placed on the market. The FHA broadly defines an "aggrieved person" to include "any person who . . . *believes* that such person *will be injured* by a discriminatory housing practice that is *about to occur*." § 3602(i)(1) (emphasis added). Clearly, there is no need for a completed sale or rental in order for a party to bring a claim for a discriminatory housing practice under the FHA. *See, e.g., United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992) (merely "offering black testers apartments at higher rental rates than those offered to white testers discriminates in the terms of rentals and violates the [Fair Housing] Act.")

Second, the expectation that disabled persons

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[4] The fact that the Ninth Circuit's decision constitutes a judicial amendment is underscored by Respondent's own phraseology: "As the Ninth Circuit has determined that the design and construction of an FHA-non-compliant building alone, without the sale or rental of individual units, is actionable under the FHA, the disabled can *now* bring their § 3604(f)(3)(C) claims during the design an construction phase." Oppo. at 12 (emphasis added).

would have to monitor construction projects is patently unreasonable – the disabled cannot be expected to do the job that professional architects, site engineers, and builders are paid to do.

Finally, many disabled persons who are seeking accessible housing move to an area after the multifamily housing is already built or seek accessible housing after *becoming* disabled due to an accident or illness. Indeed, some (wounded soldiers, for example) may both move to an area to seek accessible housing after becoming disabled. The Ninth Circuit's statute of repose clearly limits such persons' ability to enforce the FHA.

IV. Respondent Completely Fails To Address Petitioners' Arguments Regarding The Plain Language Of The Statute And Canons Of Statutory Construction.

Part III of the Petition ("The Decision of the Ninth Circuit in Incorrect") shows how the decision of the Ninth Circuit is clearly contrary to the plain language of the statute and to cannons of statutory construction. Pet. at 11-18.

Rather than respond to the Petition, however, Respondent simply repeats portions of the Ninth Circuit's decision along with an admixture of laudatory comments regarding the Ninth Circuit's "logic," "reason," and its efforts to "explain" and "admonish." Oppo., at 14-18.

Respondent's failure to address the arguments presented in the Petition for a Writ of Certiorari can only be interpreted as *a tacit admission* that the decision of the Ninth Circuit is incorrect.

V. CONCLUSION

The Brief in Opposition provides additional support for granting the Petition for a Writ of Certiorari.

Respectfully submitted.

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